FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE, *et al.*,
Petitioners,

v.

THE CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

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BRIEF *AMICI CURIAE* OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES AND THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. THE ESCONDIDO ORDINANCE DOES NOT AUTHORIZE A "PERMANENT PHYSICAL OCCUPATION" OF PROPERTY	10
II. THE ESCONDIDO ORDINANCE DOES NOT DENY MOBILE HOME PARK OWNERS ECONOMICALLY VIABLE USE OF THEIR PROPERTY	15
A. The Escondido Ordinance Allows Petitioners to Collect "Just, Fair and Reasonable" Rents	15
B. Petitioners Are Not Entitled to Treat the Excess Over a "Just, Fair and Reasonable" Rent as a Separate "Parcel" for Purposes of Takings Law Analysis	17
III. THE ESCONDIDO ORDINANCE SUBSTANTIALLY ADVANCES LEGITIMATE STATE INTERESTS EVEN IF FUTURE TENANTS MAY NOT RECEIVE EXACTLY THE SAME PROTECTION AS EXISTING TENANTS	22
CONCLUSION	25

TABLE OF AUTHORITIES

CASES: Page

Agins v. City of Tiburon, 447 U.S. 225 (1980) 3, 15
Andrus v. Allard, 444 U.S. 51 (1979) 19
Armstrong v. United States, 364 U.S. 40 (1960) 7, 25
Azul Pacifico, Inc. v. City of Los Angeles, Nos. 90-55853, 90-56066, 1991 U.S. App. LEXIS 26335 (9th Cir. Nov. 1, 1991) 22
Block v. Hirsh, 256 U.S. 135 (1921) 12, 23, 24
Bowles v. Willingham, 321 U.S. 503 (1944) 11, 23
Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396 (1920) 21
Calahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788 (1935) 19
Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) 12
FCC v. Florida Power Corp., 480 U.S. 245 (1987) .. 12
Ferguson v. Skrupa, 372 U.S. 726 (1963) 24
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 3
Fort Smith Light & Traction Co. v. Bourland, 267 U.S. 330 (1925) 21, 22
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 11
Hodel v. Irving, 481 U.S. 704 (1987) 18
Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1981) 17
Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934) 11
Kaiser Aetna v. United States, 444 U.S. 164 (1979) 13
Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) ..... *passim*
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) ..... *passim*
MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) 3, 16
Nebbia v. New York, 291 U.S. 502 (1934) 24
Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 12, 15

TABLE OF AUTHORITIES—Continued

Page

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 3, 16, 17, 19
Pennell v. City of San Jose, 485 U.S. 1 (1988) ..... *passim*
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 15
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 24
Preseault v. Interstate Commerce Commission, 494 U.S. 1 (1990) 3
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 11
Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946) 11
San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 3
Stewart v. Green, 300 So. 2d 889 (Fla. 1974) 9
United States v. Sperry Corp., 493 U.S. 52 (1989) .. 14

STATUTORY MATERIAL:

16 U.S.C. § 461 2
16 U.S.C. § 468 2
California Civil Code:
§§ 798 *et seq.* 7
§ 798.55 ..... 8, 9, 16
§ 798.55(a) 8
§ 798.56 ..... 8, 9
§ 798.56(g) 8, 16
§ 798.57 ..... 8, 16
§ 798.73 ..... 8, 9
§ 798.74 ..... 8, 9
New York Unconsolidated Law:
§§ 2100-2210 20
§ 2105.3 20
§ 2205.3 20
Escondido Municipal Code, Article V:
§§ 1-9 7
§ 4(g) 7

TABLE OF AUTHORITIES—Continued

	Page
§ 6	8, 9
§ 6(a)	9
LEGISLATIVE MATERIAL:	
S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2285	2
MISCELLANEOUS MATERIAL:	
Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399 (1988)	9
Note, *Mobile Home Park Practices: The Legal Relationship Between Mobile Home Park Owners and Tenants Who Own Mobile Homes*, 3 Fla. St. U. L. Rev. 103 (1975)	8
Note, *The Community and the Park Owner Versus the Mobile Home Park Resident: Reforming the Landlord-Tenant Relationship*, 52 B.U.L. Rev. 810 (1972)	8

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, we file this brief as *amici curiae* in support of respondent City of Escondido. Letters of consent from counsel for the parties have been filed with the Clerk.

Amici are organizations concerned with the protection and conservation of the nation's historic and natural environment, and with land use regulation and planning that serves to protect the character of America's cities, towns, and countrysides. *Amici* seek to encourage environmentally and economically sound land use policies at all

levels of government. *Amici* seek to preserve the authority of federal, state, and local governments to adopt or apply regulations necessary, in the public interest, to promote these policies.

The National Trust for Historic Preservation ("National Trust") was chartered by Congress in 1949 as a private charitable and educational organization to further the historic preservation policy of the United States and to "facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest." 16 U.S.C. §§ 461, 468 (1988). Congress intended that "[the National Trust] will mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources." S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2285, 2288. The National Trust has more than 250,000 individual members, including 23,000 members who reside in the State of California, as well as some 6,600 member organizations nationwide.

The American Planning Association ("APA") is a nonprofit public interest and research organization representing over 27,000 practicing planners, elected and appointed officials, and citizens involved with urban and rural planning issues. Many of the APA's members are involved in the day-to-day formulation of planning policies and the preparation of land use regulations.

Both the APA and the National Trust have a vital interest in securing judicial decisions that ensure the continued validity and effectiveness of regulatory protections for historic properties and regulations that otherwise serve to protect the character of America's cities, towns, and countrysides. To this end, the National Trust, through its Legal Defense Fund, maintains an active legal advocacy program to ensure the effective application of federal, state, and local laws that protect historic resources, and to uphold the constitutionality of such laws under both the U.S. Constitution and the constitutions of

the various states. Since 1970, the National Trust has participated in nearly 70 cases in federal and state courts, including six cases before this Court involving challenges to governmental regulatory authority under the Takings Clause of the Fifth Amendment.*

SUMMARY OF ARGUMENT

Petitioners rent their property for occupancy by stationary mobile homes. Under California law and an ordinance of the City of Escondido, they are free to leave that business at any time, but while they remain in the business they may charge tenants only "just, fair and reasonable" rents and may not terminate a tenant without cause or refuse without cause to accept the purchaser of a tenant's mobile home as a successor tenant. Petitioners, who have not applied for any rent increase, concede the constitutionality of rent control in general and as applied for the benefit of existing tenants. Their contention, in essence, is that on its face the ordinance "takes" a property interest consisting of the value of the difference between (a) the "just, fair and reasonable" rents they will be permitted to charge second and succeeding tenants, and (b) whatever rents the market might turn out to bear.

I. The ordinance plainly does not cause a "permanent physical occupation" of petitioners' property within the meaning of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This Court has applied that term only to regulations that require wholly uninvited physical intrusions. Petitioners, unlike the complainants in *Loretto*, *Nollan*, and *Kaiser Aetna*, have suffered *no* uninvited physical presence on their property: the business

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* *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

in which they are voluntarily engaged inherently entails the physical presence of mobile homes and their owners on petitioners' land. Petitioners are therefore in the same position as the complainants in *PruneYard* and *Florida Power Corp.* and numerous other regulated property owners: having opened their property to the physical use that is being made of it, they may challenge applicable regulations as going "too far" under the Court's traditional multifactor analysis, but they cannot claim a physical invasion.

Attempting to apply the "permanent physical occupation" rule to regulations that do not impose any uninvited physical presence on property would be a serious mistake. Forcing an owner to accept wholly uninvited persons or things on his property is, regardless of other circumstances, an inherently severe intrusion—a denial of his basic right to exclude others. Regulation of an owner who has not sought to exclude others may go "too far," but whether it does depends on circumstances and requires a multifactor analysis. A cardinal virtue, noted in *Loretto*, of the "permanent physical occupation" test is that it draws a bright line around a set of clear cases. Departing from the requirement of an uninvited physical presence would deprive the test of its clarity and future usefulness.

II. The ordinance does not deny mobile home park owners economically viable use of their property. To the contrary, the ordinance allows petitioners to charge tenants "just, fair and reasonable" rents for a voluntary and terminable use of their land. The suggestion of certain *amici* that in the future the Escondido Mobilehome Park Rental Review Board might not in fact allow "just, fair and reasonable" rents is wholly irrelevant to this facial challenge.

Petitioners and their *amici* therefore attempt to shrink the "denominator of the fraction." They argue, in various ways, that for purposes of takings law analysis the relevant "parcel" of property *is* the difference between

"just, fair and reasonable" rents and whatever higher rents the market might turn out to bear. And they say, in essence, that the ordinance goes "too far" because it deprives them of "all" of this "parcel."

On the face of it, this is an extraordinary claim. This Court has generally looked to the "parcel as a whole" and has resisted attempts to carve up an economically integrated unit into separate property interests for purposes of takings law analysis, even where (as in *Penn Central* and *Keystone*) physically separate portions of the property were at issue. The interest in collecting *more* than a "just, fair and reasonable" rent is certainly not an interest recognized as distinct under state law, or about which petitioners could logically have distinct "reasonable" investment-backed expectations. More fundamentally, if the very rights that are denied by an otherwise lawful regulation are posited to be *the* relevant property for purposes of takings law analysis, then every price ceiling and a great many other regulations effect express takings.

Petitioners argue that in Escondido the right to collect rents in excess of "just, fair and reasonable" levels *has become* a separate property interest, because (they say) the Escondido ordinance has not merely denied the park owners excess rents but conveyed the right to collect them to existing tenants, who can transfer that right to their successors. But existing tenants have received no such right, either *de jure* or *de facto*. Unlike an unregulated landlord, who can charge tenants whatever the market turns out to bear over time (or bargain away that right by granting a long-term lease at an acceptably high rent), a tenant selling a mobile home cannot assure his purchaser of any level of rents or any period of tenure: the Escondido Board may grant the park owner substantial rent increases at any time or times, without regard to the interests or expectations of any tenant, and the park owner is free to leave the business at any time. The fact that

pad rents are subject to "just, fair and reasonable" limits may affect the prices at which mobile homes are sold, but all sorts of regulations have beneficial effects on the market values of properties held by other persons without creating separate "parcels" for purposes of takings law analysis.

III. Petitioners concede that the ordinance substantially advances a legitimate governmental interest with respect to existing tenants: it protects them against the substantial bargaining leverage (stemming from the zoning-induced scarcity of sites and the *im*mobility of "mobile" homes) that might otherwise enable the park owner to charge exorbitant rents and impose other excessively onerous conditions.

Petitioners argue, however, that the ordinance ceases to serve any such interest after the first tenancy, because (they say) the first tenant can add the value of all future excess rents to the price at which he sells his mobile home, depriving the second and subsequent tenants of the protection of the ordinance. But, first, even if that were true, the ordinance would serve the substantial continuing purpose of preventing the park owner from exploiting the immobility of the mobile home at the time of sale, by raising rents and driving down the selling price of the mobile home to less than its fair value. And more importantly, the ordinance plainly does protect second and subsequent tenants against the landlord's continuing ability to exploit conditions of scarcity and immobility to extract exorbitant rents; the protection may not be perfect, but it is clearly substantial because existing tenants (who may be constrained by their own needs to relocate and in any event cannot assure either future rent levels or any period of tenure) plainly cannot extract all or most of the value of that protection when they sell their mobile homes.

Finally, petitioners' claim would entirely disappear (although petitioners would not be a penny richer) if Escondido were to enact an *additional* ordinance limiting the

sales prices of mobile homes to the amounts that could be collected if pad rents were not controlled. But a regulation does not effect a "taking" merely because it leaves some persons unregulated and therefore may not fully achieve its objectives. A regulation effects a taking if it imposes a burden that "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A landowner able to charge "just, fair and reasonable" rents for a voluntary and terminable use of his land simply cannot claim that he bears any such burden.

ARGUMENT

Petitioners are engaged in the business of renting their property for occupancy by stationary mobile homes. The Escondido Municipal Code, Article V, Sections 1-9, J.A. 21-30 (the "ordinance"), permits a person engaged in that business to charge a first tenant, and every succeeding tenant, a "just, fair and reasonable" rent as determined and redetermined from time to time.[1] It forbids petitioners, as long as they are engaged in that business, from charging whatever additional rent the market might bear. Together with California's Mobilehome Residency Law, Cal. Civ. Code §§ 798 *et seq.* (West 1982 & Supp. 1991) (Pet. App. D), the ordinance also forbids park owners from terminating tenants without cause[2] or re-

[1] *See* Ordinance § 4(g), J.A. 25-27. The ordinance lists eleven factors to be considered in determining a "just, fair and reasonable" rent. Each factor relates to economic fairness to the landlord, without regard to the economic circumstances of the tenant. *Cf. Pennell v. City of San Jose*, 485 U.S. 1, 20-24 (1988) (Scalia, J., concurring and dissenting). Petitioners have challenged the ordinance on its face, without applying for a rent increase, and for purposes of the present case it must be assumed that the factors in the ordinance would be applied in a constitutional manner to produce a "just, fair and reasonable" rent. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-96 (1987).

[2] The Mobilehome Residency Law provides that a mobile home park owner may terminate a tenancy for: (a) failure to comply

fusing without cause to accept purchasers of mobile homes as successor tenants.[3] Petitioners are free to leave the mobile home park business at any time on reasonable notice and to devote their property to other uses. *See* Cal. Civ. Code §§ 798.55, 798.56(g), 798.57.

Petitioners properly concede (Br. 7) that they have no general constitutional right to charge more than a "just, fair and reasonable" rent.[4] They do not dispute the public purpose underlying mobile home park rent controls, i.e., to assure that a park owner's substantial bargaining leverage, stemming from the tenant's placement of his expensive and largely *im*mobile home in the park and from a zoning-induced scarcity of sites, does not enable the park owner to charge exorbitant rents.[5]

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with a local ordinance or state law or regulation relating to mobile homes; (b) conduct on park premises that constitutes a substantial annoyance to other mobile home owners or residents; (c) conviction of the mobile home owner or resident for certain offenses in the park; (d) failure to comply with a reasonable rule or regulation that is part of the rental agreement; (e) nonpayment of rent, utility charges, or reasonable incidental service charges; (f) condemnation of the park; or (g) change of use of the park. Cal. Civ. Code §§ 798.55, 798.56. The ordinance contains similar restrictions that apply to tenancies not subject to the California statute. Ordinance § 6, J.A. 28-29.

[3] The Mobilehome Residency Law provides that the park owner may reject a successor tenant if that tenant does not have the ability to pay the rent or if the owner determines that the tenant will not comply with park rules. Cal. Civ. Code § 798.74. It also provides that a park owner may require removal, at the time of sale, of a mobile home not meeting specified age, size, and safety requirements. *Id.* § 798.73.

[4] *See, e.g., Pennell*, 485 U.S. at 12 n.6.

[5] *See* Cal. Civ. Code § 798.55(a); Note, *The Community and the Park Owner Versus the Mobile Home Park Resident: Reforming the Landlord-Tenant Relationship*, 52 B.U.L. Rev. 810 (1972); Note, *Mobile Home Park Practices: The Legal Relationship Between Mobile Home Park Owners and Tenants Who Own Mobile*

Petitioners also do not contend that they have a constitutional right, as long as they remain in the mobile home park business, to terminate existing tenants without cause, or to refuse without cause to accept purchasers of mobile homes as successor tenants.[6] A legislature could properly find (as Escondido's City Council did, *see* J.A. 33) that, since a "mobile" home often cannot be moved at reasonable cost, the right to terminate a lease without cause, or to refuse without cause to allow the tenant who owns the home to sell it in place to another tenant, would unfairly put the mobile home owner at the mercy of the park owner during the tenancy and at the time of sale.

Petitioners' claim is that the combination of otherwise constitutional rent controls and otherwise constitutional tenure/successorship provisions allows an existing tenant to obtain from a purchaser of his mobile home some portion of an element of value they say belongs to them. Specifically, the "property" they claim has been taken is the value of the difference between (a) the "just, fair and reasonable" rents, determined over time, that may be

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Homes, 3 Fla. St. U. L. Rev. 103, 104 (1975); *Stewart v. Green*, 300 So. 2d 889, 892 (Fla. 1974) (recognizing park owners' "overriding economic advantage over tenants"); *cf.* Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399, 406-11 (1988) (recognizing mobile home rent controls exist in 75 California jurisdictions); *Pennell*, 485 U.S. at 20 (Scalia, J., concurring and dissenting).

[6] For example, petitioners do not complain that the ordinance's "Permissible Reasons for Terminating or Refusing to Renew a Tenancy," Ordinance § 6, J.A. 28-29, fail to include any matter that should count as reasonable cause. The primary restrictions are contained in the California statute, Cal. Civ. Code §§ 798.55, 798.56, 798.73, 798.74, whose constitutionality is not placed in issue by any of petitioners' Questions Presented. The Escondido ordinance applies some of these restrictions to tenancies not covered by the statute, *see* Ordinance § 6(a), J.A. 28, but petitioners do not challenge this feature of the ordinance.

charged to the second and succeeding tenants,[7] and (b) whatever rents the market might turn out to bear.

Ironically, petitioners' claim depends entirely on the failure of the ordinance to go further than it does: if the City of Escondido enacted a "Mobile Home *Sales Price* Control Ordinance," barring a tenant from charging more than he could collect if his mobile home "pad" rent were not controlled—and thus assuring succeeding tenants the full benefit of whatever the controlled pad rents turn out to be—petitioners would not be a penny richer, but their constitutional claim would disappear.

We argue in Part I that Escondido's regulation of the landlord-tenant relationship does not involve a "permanent physical occupation." In Part II, we argue, first, that an ordinance which allows a "just, fair and reasonable" return provides an "economically viable use" of property and, second, that petitioners cannot treat the right to collect *more* than a "just, fair and reasonable" rent as a separate "parcel" (what one *amicus* calls a "marketable servitude") for purposes of takings law analysis. In Part III, we argue that the ordinance substantially advances a legitimate governmental interest after, as well as during, the first tenancy.

I. THE ESCONDIDO ORDINANCE DOES NOT AUTHORIZE A "PERMANENT PHYSICAL OCCUPATION" OF PROPERTY

As mobile home park owners, petitioners have voluntarily chosen to devote their property to a business use that inherently entails the physical presence of structures and persons (mobile homes and their owners) on their land. Petitioners are similar in this respect to many other property owners—such as apartment landlords, innkeepers, shopping center operators, restauranteurs, and com-

[7] Petitioners do not claim any constitutional right to collect this excess rent during the length of time that the first tenant remains on the property.

mon carriers—who have invited certain categories of persons and things onto their property and find the terms of that invitation subject to regulation. Whatever else may be said about any such regulation, treating it as "permanent physical occupation" is inconsistent with this Court's past use of that term and would rob the term of its future usefulness.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court announced a "very narrow," *id.* at 441, exception to the usual multifactor regulatory takings inquiry in cases where a regulation authorizes what the Court called a "permanent physical occupation." But the Court made it clear that the term "permanent physical occupation" applies only to *wholly uninvited intrusions*. The Court stressed that the television cable installation requirement at issue meant that a "*stranger* [a ½" cable wire and box] directly invades and occupies the owner's property." *Id.* at 436 (emphasis in original). The Court distinguished *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), on the ground that a shopping center owner desiring to prevent invasion by individuals seeking to exercise free speech and petition rights "had not exhibited an interest in excluding all persons from his property" and "had already invited the general public." *Loretto*, 458 U.S. at 434. In those circumstances, the Court said, "the fact that the solicitors may have physically invaded the owners' property cannot be viewed as determinative." *Id.* (quoting *PruneYard*, 447 U.S. at 84) (brackets omitted).[8] Speaking

[8] The Court cited a number of cases, many of which *did* involve the physical presence of persons or objects not individually invited or wanted by the property owner, for the proposition that landlord-tenant relationships are not governed by the "physical occupation" rule. *See* 458 U.S. at 440 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946) (fire regulation); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control); *Home Building & Loan Ass'n v. Blaisdell*,

directly to regulation of landlord-tenant relations, the *Loretto* Court said that where such regulations do not require the landlord to suffer an uninvited physical occupation of a portion of his building by a third party, "they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Loretto*, 458 U.S. at 440.

Later cases have reiterated this point. In *FCC v. Florida Power Corp.*, 480 U.S. 245, 252-53 (1987), the Court rejected a challenge, based on *Loretto*, to a requirement that utility poles carry a cable at a regulated rent of $1.79 rather than the $7.15 rent offered by the utility. The Court said, "it is the invitation, not the rent, that makes the difference." *Id.* at 252. Similarly, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), while invalidating a requirement that landowners grant an easement over their property that was unrelated to the regulatory purpose asserted by the state, the Court distinguished *PruneYard* on the ground that the shopping center owner "had already opened his property to the general public." *Id.* at 832 n.1.[9]

The Court's distinction between regulations imposing uninvited physical invasions and the regulation of a prop-

290 U.S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control)).

[9] Indeed, *Nollan* makes it clear that otherwise valid regulation of an activity in which a landowner chooses to engage *may* involve a permanent physical presence on the landowner's property without triggering the per se "permanent physical occupation" rule. While invalidating a requirement that a landowner grant an unrelated easement as the price for obtaining a building permit, the *Nollan* Court said that if the state had imposed a condition whose purpose was the assumedly proper one of assuring continuing visual access to the ocean, "the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot *on their property* for passersby with whose sighting of the ocean their new house would interfere." 483 U.S. at 836 (emphasis added).

erty owner's relationship with an invited public makes obvious sense. Forcing a property owner to accept a wholly uninvited presence on his property, denying him the basic right to exclude others, is a clear-cut and severe "per se" intrusion on his rights. Where a property owner has not sought to exclude other persons or objects from his property, otherwise valid regulation of his relationship with those persons and objects is not inherently a severe intrusion, and whether it goes "too far" in a particular case plainly depends on the circumstances, warranting a multifactor inquiry.[10]

Petitioners here, like the shopping center owner in *PruneYard* and unlike the petitioners in *Loretto* and *Nollan*, invited the physical use of their property in exactly the physical way it is being used.[11] They are not seeking to terminate or otherwise change that physical use (which they could do if they wished, *see* p. 8,

[10] Petitioners and their *amici* get no help from their repeated citations of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Stripped of the "navigational servitude" issues (which were central to that case but are irrelevant here), *Kaiser Aetna* involved a federal command that private land be permanently opened to free use by a wholly uninvited general public. If the federal action had been a regulation of a business or activity in which the public had been invited to participate, the analysis would have been entirely different. If, for example, the government had merely required a commercial marina already serving the public at large to serve persons without regard to race or creed, or barred such a marina from declining to serve any person without cause, or set fair and reasonable ceiling prices for marina services under conditions of scarcity, a taking claim would not have been analyzed in "physical occupation" terms—and probably would have been dismissed as frivolous.

[11] Petitioners obviously cannot claim that they have suffered an uninvited physical occupation merely because they must in some circumstances accept tenants not individually of their own choosing. This Court would have little difficulty, for example, with a claim that a mobile home park owner, or an apartment owner, suffers a permanent physical occupation merely because he cannot reject tenants on account of race or religion.

supra).[12] Their objection is solely to the economic terms on which they are required to conduct the business in which they have chosen to engage. A complaint solely about economic regulation does not involve the "special kind of injury" that results from physical invasion. *Loretto*, 458 U.S. at 436.

More importantly, the term "permanent physical occupation," which now draws a bright line around cases where the invasion is truly a physical one, would cease to draw any intelligible line at all if it were potentially applicable to all economic regulation that touches on the physical use of property, where the physical use is not itself uninvited.[13] This Court stressed in *Loretto* that one reason for the "permanent physical occupation" rule is that it "avoids otherwise difficult line-drawing problems" and "presents relatively few problems of proof." *Id.* at 436, 437. Petitioners' attempt to apply the per se "permanent physical occupation" rule to the complexities of the landlord-tenant relationship would obliterate the very

[12] In *Loretto*, the Court noted that it was not a valid objection to petitioner's taking claim that she could avoid the cable attachment requirement "by ceasing to rent the building to tenants." 458 U.S. at 439 n.17. But the objection would have been perfectly valid if the physical presence to which the petitioner in that case objected had been the occupation of the building by tenants. Since she objected only to the presence of a wholly uninvited cable wire and box, it would hardly have been fair to suggest that she could avoid the objectionable intrusion by giving up her basic business. Here, in contrast to *Loretto*, the only physical occupation at issue—the presence of mobile homes and their owners on petitioners' land—is physically inherent in the business to which they have voluntarily devoted their property.

[13] The rent difference at issue in this case is of course not property that is capable of being physically occupied. *Cf. United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (holding that taking a percentage of a monetary award from recipient is not a physical occupation of property, since "[u]nlike real or personal property, money is fungible.").

features that make the rule useful.[14] This is a case that, as the Court said in *Loretto*, must be "analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Id.* at 440.

II. THE ESCONDIDO ORDINANCE DOES NOT DENY MOBILE HOME PARK OWNERS ECONOMICALLY VIABLE USE OF THEIR PROPERTY

The Court has developed a two-pronged test to determine whether a regulation affecting the use of private property "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and becomes a taking. A regulation "does not effect a taking if it substantially advance[s] legitimate state interests and does not den[y] an owner economically viable use of his land." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quotation marks omitted); *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). We take up "economically viable use" in this part and "legitimate state interests" in Part III.

A. The Escondido Ordinance Allows Petitioners to Collect "Just, Fair and Reasonable" Rents

On its face, the Escondido ordinance allows petitioners to collect a "just, fair and reasonable" rent for each pad in their mobile home parks, determined on the basis of factors reflecting their economic situation as park owners.[15] Petitioners also have the right under the California statute to go out of the mobile home park business and devote their property to other uses they find more profit-

[14] Indeed, one *amicus* now suggests that if rent control of mobile home parks constitutes a per se taking, then rent control of apartment housing must also constitute a per se taking. *See* Brief of Amicus Curiae The Apartment Association of Greater Los Angeles at 3-7.

[15] *See* note 1, *supra*.

able.[16] It could hardly be clearer that petitioners have not been denied economically viable use of their land.

The Court has found that a regulation denies "economically viable use" of property only when it denies the owner a "reasonable return" on his investment, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978), or otherwise renders use of the property "commercially impracticable." *Keystone*, 480 U.S. at 493, 499. In *Penn Central*, the Court upheld the city's landmark preservation ordinance on the ground, *inter alia*, that it permitted Penn Central "not only to profit from the [Grand Central] Terminal but also to obtain a 'reasonable return' on its investment." 438 U.S. at 136. By expressly permitting a "just, fair and reasonable" rent, the Escondido ordinance easily passes the economic viability test developed by the Court.

Sensing this weakness in petitioners' case, certain *amici*[17] suggest that the rents actually allowed in future proceedings under the ordinance may not in fact be "just, fair and reasonable." That suggestion is obviously irrelevant to this facial challenge. Petitioners have not applied for, let alone been denied, any rent increase, and there is no basis at this stage for speculating about the reasonableness of future rents. The Court has emphasized time and again the need to postpone considering whether a regulation effects a taking until the economic impact on the property owner can be determined. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 10-11 (1988); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 349-53 (1986) (affirming decision sustaining demurrer to complaint, where zoning board had not issued final decision on permitted uses); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981). Any assumption that rents in Escondido will be inadequate in the future is wholly unwarranted.

[16] *See* Cal. Civ. Code §§ 798.55, 798.56(g), 798.57.

[17] *See, e.g.*, Brief Amicus Curiae of Western Mobilehome Association at 10 n.9; Brief of Amicus Curiae The Apartment Association of Greater Los Angeles at 13; Brief of Manufactured Housing Educational Trusts of Los Angeles County and Orange County as Amici Curiae at 19-20.

B. Petitioners Are Not Entitled to Treat the Excess Over a "Just, Fair and Reasonable" Rent as a Separate "Parcel" for Purposes of Takings Law Analysis

Obviously unable to show that they are denied an economically viable use of their parks as a whole, petitioners and their *amici* seek to shrink "the denominator of the fraction," *Keystone*, 480 U.S. at 497, to a portion of their property. They ask this Court, in various ways, to treat as a "separate parcel" the monetary value of the difference between controlled and uncontrolled rents. What petitioners have lost is the right to charge more than a "just, fair and reasonable" rent, and their argument is, in essence, that the ordinance has gone "too far" because it has taken *all* of that right.

Stated that way, this argument proves much too much. If, as petitioners and certain of their *amici* contend, any diminution in the value of their parks caused by the ordinance is the very property interest that serves as the denominator in determining whether the ordinance goes "too far," then a great many regulations effect express takings, because whatever use or element of value of property is restricted by a challenged law is the property interest at issue. For example, if the excess over every otherwise lawful price ceiling were treated as a separate property interest, "all" of which is taken by the price regulation, then every price regulation would be a taking.

Even where physically distinct portions of a parcel are involved, this Court has been consistently inhospitable to attempts to show that a regulation goes "too far" by defining the property at issue as a mere portion of an economically integrated unit. In *Penn Central*, 438 U.S. at 130-31, the Court rejected the contention that the air space over Grand Central Terminal should be considered

separately, stating that the relevant property was the "parcel as a whole—here the city tax block designated as the 'landmark site.'" Similarly, in *Keystone*, 480 U.S. at 498, the Court rejected an argument by owners of coal property that a statute requiring them to leave specified amounts of coal in place constituted a complete taking of the coal left in place. The Court followed *Penn Central*'s "parcel as a whole" doctrine, noting that the property owners had not shown that they had treated the affected coal as a separate parcel about which they had formed "reasonable 'investment-backed expectations'" and noting that the relevant property interest consisted of the owners' entire economically integrated "mining operation." *Id.* at 498-99.[18]

The property interest that petitioners would have this Court consider separately—the monetary value of rents in excess of "just, fair and reasonable" levels—is certainly not by any traditonal test a separate "parcel" for purposes of determining whether the regulation has gone "too far." The right to charge excess rents is not a property interest that park owners had ever previously

[18] This case is not like *Hodel v. Irving*, 481 U.S. 704 (1987), where a long-established "essential stick" in the bundle of property rights suffered "total abrogation." *Id.* at 716. In *Hodel*, the Court reiterated that "the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners." *Id.* at 713. The Court made it clear that even very intrusive regulation of the descent and devise of the Indian lands in question would not have effected a taking. *Id.* at 718. The Court found a taking because of: (a) the repeatedly emphasized fact that there was "a *total* abrogation" of the ancient right to pass property to one's heirs, *id.* at 717 (emphasis in original); and (b) the fact that the right was "abolished even in circumstances when [abolition would not serve] the governmental purpose sought to be advanced." *Id.* at 718. There is nothing in the Escondido ordinance that is remotely comparable to a "total abrogation": rents are subject to adjustment as circumstances warrant and are applicable only so long as petitioners choose to devote their property to use as a mobile home park. And, as discussed in Part III, *infra*, the ordinance here at all times "[serves] the governmental purpose sought to be advanced."

treated separately, nor is it an interest about which they could have formed distinct "reasonable" investment-backed expectations. *Cf. Penn Central*, 438 U.S. at 130 & n.27; *Andrus v. Allard*, 444 U.S. 51, 66 (1979). Nor, of course, is the interest of a park owner in charging excess rent an interest previously recognized under state law as distinct and separately marketable. *Cf. Keystone*, 480 U.S. at 518-19 (Rehnquist, C.J., dissenting).[19] By no traditional test is the value of excess rents a separate property interest that serves as its own "denominator."

Petitioners argue, however, that in Escondido the right to charge rents in excess of "just, fair and reasonable" levels to second and subsequent tenants *has become* a separate property interest (*amicus* Pacific Legal Foundation (PLF) calls it a "marketable servitude," PLF Br. 6), because the Escondido ordinance (they say) in effect conveys the right to collect excess rents from the landlord to the existing tenants. They construe the ordinance to provide, in substance, "L conveys to ET portion X of the rents on Blackacre in perpetuity." But the Escondido ordinance neither says nor does any such thing.

The ordinance plainly does not confer on any tenant any *de jure* right to collect any share of future rents, or any equivalent amount. The ordinance merely limits the landlord to "just, fair and reasonable" rents and requires him to accept the purchaser of a mobile home as a successor tenant unless the landlord has cause to object. Thus, while the ordinance denies the landlord the right to charge

[19] *Amicus* Pacific Legal Foundation (PLF) cites *Calahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788 (1935), for the unremarkable proposition that the right to receive rents and profits is recognized by California law as an interest inherent in the ownership of property. (PLF Br. 7.) But that is not the interest at issue here: petitioners retain the right to collect "just, fair and reasonable" rents. What they have been denied is the right to collect *excess* rent, and no case has ever treated that as a separate property interest under California or any other state law.

whatever the market will bear, it does not purport to confer that right, or any equivalent right, on a selling tenant.

Nor does the ordinance as a practical matter confer on existing tenants anything like, or economically equivalent to, the power of an unregulated landlord to raise rents at any time to reflect conditions of scarcity and tenant immobility. A selling tenant cannot assure his purchaser of any level of rents or any period of tenure. The Escondido Mobilehome Park Rental Review Board may grant the park owner substantial rent increases at any time or times and is not directed to give any weight to any tenant's need, expectations, or investment. Furthermore, the park owner may leave the business at any time of his choosing.[20] A selling tenant therefore cannot extract anything like the full value of the "excess" rents that an unregulated landlord might later be able to charge, and a purchaser (like the protagonist of petitioners' anecdote (Br. 10-11)) who pays more for a mobile home than it is otherwise worth solely to obtain a rent-controlled location may well turn out to have made a bad decision.[21]

Of course, the tenant's property—the mobile home—may at a given time sell for a higher price because the

[20] The purchaser also has no assurance that Escondido will not later decide to regulate mobile home transfer prices. For example, the State and City of New York supplement their rent control ordinances, N.Y. Unconsol. Law §§ 2100-2210 (McKinney 1987 & Supp. 1991), with prohibitions against "key money"—side payments to an outgoing tenant by an incoming tenant, in the form of excess payments for furniture or other personal property for assistance in obtaining a rent-controlled apartment. *Id.* §§ 2105.3, 2205.3. A purchaser in Escondido therefore cannot be certain that any premium he pays for a mobile home can be passed on to his successor.

[21] "One Mrs. Morrison," the protagonist in petitioners' anecdote, was certainly mistaken if she thought she was buying an interest in land: all she in fact received was the right to take her chances that the park owner would stay in the mobile home park business and that "just, fair and reasonable" rents (determined without regard to her purchase price or her needs or interests) would turn out to be a bargain.

pad rent is subject to the ordinance, but all sorts of regulations have that kind of effect on property values. In the City of Escondido, for example, electric, gas, telephone, cable, water, and sewer lines to the mobile home pads (and other residential properties) presumably must, once installed, continue to serve those pads (and other properties) indefinitely at regulated rates. That requirement of continued service at regulated rates limits the revenues of the servicing companies, and it obviously increases the prices at which the park, the pads, and mobile homes in place (and other properties) can be sold. But the companies that provide those services do not, merely because the rate ceilings imposed on them have enhanced the value of both pads and mobile homes, have any "taking" claim as long as they are allowed to charge just and reasonable rates. Petitioners, who concede that in general they may constitutionally be subjected to rent control, are not in any fundamentally different position than the entities who service their parks at regulated rates.[22]

Virtually every regulation that imposes restrictions on the use of property necessarily confers "monetizable" benefits on the owners of other property. The fact that the beneficiaries of such regulations may be said to have received a "marketable" benefit does not mean that a discrete, recognizable property interest has been created for

[22] Certain *amici* argue, as if this were dispositive, that the Escondido ordinance turns the mobile home parks into "public utilities." *See, e.g.*, Brief Amicus Curiae of California Mobile Home Parkowners Alliance at 12. But there is no sharp constitutional line between those businesses that may, and those that may not, be subjected to price regulation. Petitioners are exploiting a scarce resource for a business purpose; the resource they own is scarce in part because other land is subject to regulations that forbid mobile home park use. Although petitioners cannot constitutionally be required to devote their property indefinitely to the mobile home park business at a loss, *see Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396 (1920), they have no constitutional right to be free of regulation that protects their tenants. *Cf. Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330 (1925).

purposes of takings law analysis. And attaching a label like "marketable servitude" does not alter this conclusion. When Penn Central was required to forgo development of an office tower in order to preserve the historic Grand Central Terminal, neighboring property owners clearly received a measurable benefit that would ultimately be captured in the prices of subsequent property sales. When the coal owners in *Keystone* were forced to leave some of their coal in the ground, surface owners certainly received a "monetizable" benefit. Federal and state clean air regulations restrict factories in ways that add measurably to the selling prices of nearby homes. And factories in turn have gained transferable value from the "servitude" that requires railroads to continue to carry freight over existing lines. *See Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330 (1925). For this Court to treat facially valid rent regulation as a taking, merely because it may confer some transferable value on tenants, would be to start down the most slippery of slopes.

III. THE ESCONDIDO ORDINANCE SUBSTANTIALLY ADVANCES LEGITIMATE STATE INTERESTS EVEN IF FUTURE TENANTS MAY NOT RECEIVE EXACTLY THE SAME PROTECTION AS EXISTING TENANTS

Petitioners appear to concede that the Escondido ordinance substantially advances legitimate state interests with respect to tenants who were in possession of mobile homes at the time the ordinance was enacted. As to them, the city has a well-recognized interest in limiting pad rents to "just, fair and reasonable" levels, in order to (i) protect them against the bargaining leverage the landlord enjoys by virtue of having the tenant's expensive and virtually immobile property on his pad, and (ii) preclude the mobile home park owners from obtaining artificially high rents that may result from the scarcity of sites. *See Azul Pacifico, Inc. v. City of Los Angeles*, Nos. 90-55853, 90-56066, 1991 U.S. App. LEXIS 26335 at *20-

*21 (9th Cir. Nov. 1, 1991) (recognizing legitimacy of interest); *see also Pennell v. City of San Jose*, 458 U.S. 1, 20-24 (1988) (Scalia, J., concurring and dissenting); *Bowles v. Willingham*, 321 U.S. 503, 517-18 (1944); *Block v. Hirsh*, 256 U.S. 135, 156-57 (1921).

Petitioners argue, however, that the Escondido ordinance does not substantially advance a legitimate state interest after the end of the first tenancy, because the first tenant may be able to obtain for himself the value of the excess rents in the sale price he charges for his mobile home, depriving the subsequent tenant-buyer of the protection of the ordinance. To put the claim another way, petitioners concede that they do not have an absolute right to charge more than "just, fair and reasonable" rents but claim that if *anybody* is going to charge this excess, it must be the landlord and not the first tenant.

But the Escondido ordinance *does* serve legitimate purposes as applied to second and subsequent tenants. First, it prevents the park owner from exploiting the immobility of the mobile home at the time of any sale. Absent the ordinance, the park owner could arbitrarily raise the rent, driving down the sale price of the home itself by the amount it would cost to move it to a new site. Allowing arbitrary rent increases when a mobile home is sold could thus potentially enable the landlord to deprive the seller of a "just, fair and reasonable" price for his home.

Moreover, the ordinance offers second and subsequent tenants substantial continuing protection against the landlord's ability to exploit conditions of scarcity and immobility. Petitioners suggest that second and subsequent tenants will have paid for that protection *in whole* as part of the price of a mobile home in place, and thus will derive no net benefit from the ordinance, but that is plainly not true. An unregulated mobile home park owner, free to charge second and subsequent tenants whatever the market will bear, is in a substantially stronger position than a selling tenant, who may be constrained by his

own need to relocate and, in any event, can assure his successor only of whatever rents the Board finds "just, fair and reasonable" for such time as the park owner chooses to continue to operate the park. On its face, therefore, the Escondido ordinance offers second and subsequent tenants substantial protection, and the Court cannot strike it as failing to substantially advance a legitimate interest.

Like other price regulation, the Escondido ordinance may work imperfectly. By failing to control the prices charged by all relevant actors, it may leave some persons (here, selling tenants) in a position to extract some value that may stem from the controls imposed on other persons. That concern (and petitioners' entire claim) could be—and indeed may in the future be—eliminated by adoption of a "Mobile Home Sales Price Control Ordinance." But the result petitioners seek here is not more perfect regulation, so as to prevent first tenants from reaping any portion of the excess rents that are denied to landlords. To the contrary, they seek the right to capture the value of excess rents for themselves, which is not a demonstrably fairer, let alone constitutionally required, arrangement of the benefits and burdens of economic life.

At bottom, the answer to petitioners' claims is that economic regulation is not invalid simply because it is imperfect, because it leaves someone else unregulated, or even because it may be unwise. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70 (1968); *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963); *Nebbia v. New York*, 291 U.S. 502, 539 (1934); *Block v. Hirsh*, 256 U.S. 135, 158 (1921) (Holmes, J.) ("we have no concern of course with the question whether those [regulations] were the wisest, whether they may not cost more than they come to, or will effect the result desired").

It is thus clear why petitioners go to such lengths to cloak their challenge to the Escondido ordinance in the terminology of per se "takings" of interests in real property. The regulation they challenge may or may not be wise or completely successful, but on any fair analysis it does substantially advance legitimate governmental objectives of the City of Escondido. And a regulation imposing restrictions on the use of property voluntarily devoted to that use, but granting a "just, fair and reasonable" return, cannot be said to impose a burden that "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

The decision of the Court of Appeal for the State of California should be affirmed.

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